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May 31, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY
Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: MM Dkt. No. 95-31
Reexamination of the Comparative Standards
for New Noncommercial Educational Applicants

Dear Mr. Caton:

Transmitted herewith, on behalf of California State University, Long Beach Foundation, are an original and nine copies of its Reply Comments in the above-referenced rulemaking proceeding.

If questions arise, please contact this office.

Sincerely,

Ann Bavender
Counsel for California State University,
Long Beach Foundation

cc (w/encl.):
Chief, Mass Media Bureau
International Transcription Service

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of

REEXAMINATION OF THE COMPARATIVE STANDARDS FOR NEW NONCOMMERCIAL EDUCATIONAL APPLICANTS	))))	MM DOCKET NO. 95-31

Directed to: The Commission

REPLY COMMENTS

California State University, Long Beach Foundation (CSULBF), by its attorneys, hereby respectfully submits its Reply Comments in the above-captioned proceeding:

CSULBF submits these Reply Comments to address one criterion that should be eliminated, from all noncommercial comparative proceedings, as discussed by most of the commenters in this proceeding -- the share-time arrangement that has been both an issue and an arrangement imposed on applicants as a method of resolving noncommercial comparative proceedings without really resolving them. CSULBF urges that this criterion be eliminated in hearings involving both new and renewal applicants. While CSULBF understands that the Commission is not considering in this proceeding the standards applicable to mutually exclusive applications filed against renewal applications, CSULBF has had recent experience with the share-time issue in a comparative renewal hearing and offers its comments from that perspective.

Most of the commenters agree that the share-time policy should be eliminated. One commenter, however, Moody Bible Institute of Chicago (Moody Bible), has taken a strange approach to the issue in inconsistent statements in its Comments. Moody Bible states that "[t]he

share-time arrangement imposed by the Commission on mutually exclusive NCE applicants in comparative hearings has been beneficial." At the same time, Moody Bible comments that "[t]his share-time arrangement has proven to be generally unworkable and disincentivises mutually exclusive NCE applicants from engaging in comparative hearings." Moody Bible urges the Commission to retain time sharing (if the Commission declines to adopt Moody Bible's own scheme for awarding licenses) essentially because it "is deemed to be so unacceptable to mutually exclusive NCE applicants." This, of course, is an absurd reason for the Commission to retain an otherwise "unworkable" policy.

Moreover, contrary to Moody Bible's simplistic explanation of how parties will be weeded out and will settle for reimbursement of their expenses rather than face a share-time operation, the renewal applicant cannot agree to pay the expenses of a challenger and settle in advance of a hearing. Furthermore, as long as there is a lure of a forced share-time arrangement, the renewal applicant will be faced with competing applicants. See note 1 infra. Thus, there certainly is no reason to impose a share-time arrangement on existing licensees simply because the threat of such arrangements may or may not induce an applicant in a comparative hearing for a new facility to settle.

CSULBF has had first-hand expreience of a share-time issue in hearing. In 1991, CSULBF's application for renewal of the license of KLON(FM) was designated for hearing with a competing application for a new station. The Hearing Designation Order in that proceeding, DA 91-1195, 56 Fed. Reg. 51, 225 (Oct. 10, 1991), specified a share-time issue for the sole stated reason that: "Neither of the applicants has indicated that an attempt has been made to negotiate a share time arrangement." In a Motion to Delete and Modify Issues, CSULBF sought

deletion of the share-time issue. CSULBF demonstrated that its station KLON(FM) was and had been operating throughout its license period 24 hours per day, that it had a strong audience throughout the 24 hour period, and that it depended on contributions and funds it raised from listeners throughout the day. CSULBF demonstrated that approximately one third of its total revenues for KLON (FM)'s operations came from listener contributions and that losing half of its broadcast operation day would have a devastating effect on KLON (FM)'s financial support. Moreover, KLON (FM) pointed out that, having recently raised over $250,000 from public and private sources to increase power and expand service provided by KLON (FM), CSULBF would be acting contrary to the intentions of its donors and funding sources if it were to agree to surrender half of its broadcast hours of operation to an entity that proposed to eliminate the new areas and populations to which KLON (FM) proposed to bring service.

CSULBF also demonstrated that one of its major sources of funding for the operations of KLON (FM) was the Corporation for Public Broadcasting (CPB), which was in fact the largest single source of funds for KLON (FM). CPB provided funding to CSULBF for KLON (FM) through its Community Service Grants, National Program Production and Acquisition Grants, and Tune-In Grants. However, an imposed share-time arrangement would have rendered CSULBF ineligible for further funding, because share-time stations were ineligible for CPB grants!

CSULBF also demonstrated that it was a state auxiliary organization, a quasi-governmental authority, and its competitor in the hearing had indicated that its own "stated purpose ... [was] to promote Roman Catholic Orthodoxy." This stated purpose was obviously inconsistent and incompatible with the purposes and objectives of CSULBF. Moreover,

CSULBF was concerned that CSULBF's shared use of KLON (FM)'s frequency would appear to present federal Constitutional problems. CSULBF feared that such shared use between a state auxiliary organization and a religious organization could be held to raise an apparent excessive entanglement. See, e.g., Lemon v. Kurtzman, 403 U.S. 602 (1971).

More importantly, the facilities proposed by the competing applicant differed greatly from the operating facilities of KLON(FM). CSULBF demonstrated that a shared-time arrangement would mean that there would be 2,292,825 persons within KLON (FM)'s current service area who would, if CSULBF were to be forced to share-time with its competing applicant, actually lose service for a significant part of each day! A loss of noncommercial radio service to over two million persons is contrary to the public interest. Yet that factor was apparently not considered by the Commission when it specified a share-time issue in CSULBF's hearing.

CSULBF also noted that the difference in signal coverage might have a further impact on KLON(FM)'s audience and revenues, since listeners in the area that KLON(FM) would serve but its competitor would not serve would find nothing when they tried to tune to where KLON(FM) should be. Such listeners would likely have been diverted to other stations and would have been unlikely to return to KLON(FM) during its hours of operation.

Despite the loss of service and the lack of any demonstrated or perceived public interest benefit from imposition of a shared-time arrangement in the case before them, the Mass Media Bureau opposed CSULBF's attempt to delete the issue and the Presiding Judge denied CSULBF's Motion. CSULBF was left facing an issue that has no policies, precedent or guidelines by which CSULBF could have attempted to meet the issue and demonstrate that a

shared-time arrangement was contrary to the pubic interest. Fortunately the competing applicant's application was subsequently dismissed. Nevertheless, CSULBF's experience demonstrates the devastating effect that imposition of a shared-time arrangement could have on existing service.

Share-time issues should not be specified in renewal proceedings unless the renewal applicant is not operating its station 12 hours per day each day of the year and a competing applicant files an application proposing a share-time arrangement.[1] See Section 73.561(b) of the Rules.

Share-time arrangements may be appropriate mechanisms for settlement of a comparative proceeding for new facilities where all qualified applicants are agreeable; but they should never be imposed upon unwilling applicants unless they are imposed, consistent with Section 73.561 of

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[1]A decision imposing a share-time arrangement upon a renewal applicant that operated in excess of 12 hours per day would encourage competing applications against existing noncommercial licensees everywhere. Why worry about whether you can be paid off in a settlement when by the mere fact of filing a competing application you can obtain half of an operating licensee's broadcast day? As concerned as the Commission has been about abuses of the comparative renewal process, it is obvious the Commission would not want to promote sham applications against renewal applicants.

the Rules, upon applicants who are operating or propose to operate fewer than 12 hours per day each day.[2]

Respectfully submitted,

CALIFORNIA STATE UNIVERSITY,
LONG BEACH FOUNDATION

By: _____
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May 31, 1995

[2]It seems to CSULBF that the rationale used by the Commission in the past to justify shared-time operation applies equally to commercial facilities, yet the Commission has not suggested mandatory shared-time arrangements in hearings between mutually exclusive applicants for commercial facilities - nor should it do so. Shared-time arrangements should be voluntary -- not mandatory and never used as an easy method of resolving a comparative case.